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Supreme Court, U.S.
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No. 04-994

IN THE

Supreme Court of the United States

LUCENT TECHNOLOGIES INC.,

Petitioner,

v.

AARON FELIX, SR., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Petitioner Lucent Technologies Inc. ("Lucent") submits this reply brief in support of its petition to this Court to grant a writ of certiorari to review the decision below of the United States Court of Appeals for the Tenth Circuit.

Respondents' agreement with Lucent's petition underscores the importance of the issue before the Court, *i.e.*, whether a former employee has standing to sue as a benefit plan "participant" under ERISA when he claims that "but for" his employer's alleged wrongdoing, he would have been eligible for more generous benefits offered after he retired. This is an issue that has deeply divided the circuit courts and that has subjected employers with operations in multiple jurisdictions to different standards of conduct, even though their benefit plans are uniform nationwide.

Respondents' proposed additional question for this Court regarding the effect of a finding that respondents do have standing was not considered by the Tenth Circuit and is not properly before this Court. The only issue properly before the Court is the resolution of the pronounced and profound differences among the circuit courts on the scope of ERISA standing and preemption.

I. Respondents' Agreement With Lucent's Petition Underscores The Importance Of The Question Presented.

The split in the circuits on the question presented in this case is severe, but the issue itself is straightforward. The question is whether a former employee has standing to sue as a benefit plan "participant" under ERISA when he claims that "but for" his employer's alleged wrongdoing, he would have been eligible for more generous benefits under amendments to his existing pension plan that were adopted after he retired.

Eight circuit courts have said the answer to this question is yes (although one did so in dicta); three circuit courts have said

the answer is no. *See Vartanian v. Monsanto Co.*, 14 F.3d 697, 702-03 (1st Cir. 1994) (yes); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 667-68 (2d Cir. 1994) (yes); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221-23 (5th Cir. 1992) (yes); *Swinney v. General Motors Corp.*, 46 F.3d 512, 518-19 (6th Cir. 1995) (yes); *Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 791 (7th Cir. 1996) (yes); *Adamson v. Armco, Inc.*, 44 F.3d 650, 654-55 (8th Cir. 1995) (yes); *McBride v. PLM Int'l, Inc.*, 179 F.3d 737, 742-44 (9th Cir. 1999) (yes); *Miller v. Rite-Aid Corp.*, 334 F.3d 335, 340-44 (3d Cir. 2003) (yes in dicta); *Felix v. Lucent Technologies Inc.*, 387 F.3d 1146, 1162-63 (10th Cir. 2004) (no); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986) (no); *Sanson v. General Motors Corp.*, 966 F.2d 618, 620, 23 (11th Cir. 1992) (no). Such a severe split in the circuit courts presents a clear need for this Court to resolve the issue.

As both parties have pointed out, currently the geographical location in which a party is sued dictates the rights of that party with respect to standing to bring an ERISA claim. This situation cannot be squared with ERISA's goal of national uniformity in the law regulating employee benefit plans. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, ___, 124 S. Ct. 2488, 2495 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans."); 120 Cong. Rec. 29197 (statement of Rep. Dent) (a basic purpose of ERISA is "eliminating the threat of conflicting and inconsistent state and local regulation").

The problem is particularly severe for employers such as Lucent who have employees nationwide and who therefore are subject to different rules in different circuits even though the benefit plan at issue is uniform throughout the United States. Moreover, this problem is not merely theoretical — the circuit split has already subjected at least one employer to conflicting standards. *Compare Sanson v. General Motors Corp.*, 966 F.2d 618, 621 (11th Cir. 1992) (former employee who claimed

he was defrauded into retiring before a better retirement package was offered could not bring suit because he was not a benefit plan "participant" under ERISA) *with Swinney v. General Motors Corp.*, 46 F.3d 512, 518-19 (6th Cir. 1995) (former employees who claimed they were defrauded out of layoff benefits by being told they would not be eligible for the benefits if they continued to be employed had standing under ERISA; court acknowledged the contrary views of the Tenth and Fourth Circuits, but did not address the Eleventh Circuit's view or the *Sanson* decision). This Court can and should exercise its unique ability to remedy this problem.

As respondents point out in their brief, the Court may find it odd that both parties urge reversal of the Tenth Circuit decision. It was only in response to Lucent's petition, however, that respondents finally conceded that they may have ERISA standing. Respondents' new position does not render the controversy between the parties any less concrete. *See Larson v. Valente, et al.*, 456 U.S. 228, 241 (1982) (a party's change in its litigation position at the Supreme Court level did not render the controversy between the parties any less concrete).[1] Respondents continue to allege that Lucent defrauded them with respect to certain pension payments and continue to seek state law remedies not

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1. Indeed, although at first blush respondents appear to concede that they have ERISA standing, a careful reading of their response to the petition makes clear that they are keeping their options open to argue later that the $15,000 payment they seek from the Lucent Technologies Pension Plan ("LTPP") is not an ERISA benefit, which would mean that their claim is not an ERISA claim and they would not have standing under ERISA. That is, respondents have not actually conceded that they have standing under ERISA, but rather have qualified their concession by stating that *if* the benefits they seek are governed by ERISA, they *would* have standing to pursue a claim under the statute. "Such a qualified concession is too uncertain a basis to find that no live controversy is presented." *Montana v. Imlay*, 506 U.S. 5, 8 (1992) (White, J., dissenting from dismissal of certiorari).

recoverable under ERISA. Lucent (although it has not yet answered the complaint) denies respondents' substantive allegations and asserts that respondents' claim is one that should be brought, if at all, in federal court under ERISA. Thus, respondents' apparent agreement with Lucent that the Tenth Circuit's decision should be reversed does not negate the case or controversy between the parties.

In sum, the petition presents a fully developed legal issue that has been addressed by eleven badly split circuits. The congressional goal of uniformity in the operation of ERISA pension plans can be achieved only if this Court decides this straightforward, but divisive, issue of national importance.

II. Respondents' Argument Regarding The Consequence Of Reversing The Tenth Circuit Is Not Properly Before This Court And Is Incorrect In Any Event.

In response to Lucent's petition, respondents raise an entirely new argument that the Tenth Circuit did not consider. Specifically, respondents argue that if this Court were to grant the petition and reverse the Tenth Circuit, respondents will have stated a valid ERISA claim and should be allowed to proceed with that claim in federal court. Respondents' new argument is not properly before this Court.

First, the Tenth Circuit pointed out that if respondents' claims were allowed to proceed in state court they might be dismissed as a result of conflict preemption under ERISA § 514. App. 33a-34a. However, the Tenth Circuit never addressed what would have happened if it had found that respondents had standing to pursue an ERISA claim in federal court. That is, although the Tenth Circuit theorized that dismissal could be the result if the case were remanded to state court, it certainly did not address whether dismissal would be proper if the case were

allowed to be brought in federal court. Hence, there is no issue regarding dismissal on preemption (or any other) grounds before the Court and respondents are simply using the opportunity of Lucent's petition for certiorari[2] to invite this Court to pass on an issue not properly before it.

Moreover, although perhaps there would be no disagreement about the "consequences" issue if respondents now concede that the remedy they seek is a pension plan benefit, they stop appreciably short of that concession by stating that they *would* have standing *if* the payment they seek is found to be an ERISA benefit. *See, e.g.*, Resp. Br. at 5 n.2, 6, 8, 9 n.6. As they wryly observed of Lucent's arguments, respondents cannot have it both ways. Resp. Br. 9. While the record forecloses any argument that the $15,000 "special, one-time enhanced pension benefit" is not an ERISA benefit (*see, e.g.*, App. 83a-89a), the Tenth Circuit did not reach the issue and neither should this Court.

Second, should the Court address the question of ultimate dismissal, it is important to note that respondents are incorrect that dismissal is foreclosed if they have standing. Respondents' steadfast insistence throughout the case that they were not seeking equitable relief or benefits under the LTPP, and that they instead sought "damages" of $15,000 each, mandates dismissal because ERISA does not provide for such money damages. *See Great-West Life and Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002). Indeed, it was only after the Tenth Circuit pointed out that if respondents get what they want — remand to Oklahoma state court — they may be left without a remedy because of ERISA § 514 that respondents embraced the idea of complete preemption and argued that they should be allowed to proceed with an ERISA claim (of an unidentified variety). In contrast, throughout this case, respondents repeatedly

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2. Respondents did not file a cross-petition.

disavowed that they were bringing an ERISA claim, even when presented with the opportunity to amend their complaint.[3]

In sum, it is respondents, not Lucent, who are trying to have it both ways. Although they now concede that ERISA § 514 extinguishes state law claims and that a completely preempted claim does not arise under state law but is really a federal claim, they have steadfastly refused to admit that their claim is one for ERISA benefits. Throughout their brief, respondents sprinkle disclaimers that the LTPP amendment providing for the payment they seek may not actually be an ERISA plan benefit. *See*, *e.g.* Resp. Br. at 5 n.2, 6, 8, 9 n.6. If respondents' claim falls within federal jurisdiction because it is really an ERISA claim (*see Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)), then their claim for a state law remedy (money damages) must be dismissed because it is not allowed by ERISA. *See Knudson*, 534 U.S. at 213.

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3. It is curious that respondents argue that they had no opportunity to amend their complaint. Resp. Br. 3. They had numerous opportunities to do so — *e.g.*, after Lucent filed its notice of removal, after Lucent moved to dismiss, and again after Lucent opposed respondents' motion to remand — but chose at every turn to press their state law claim to the exclusion of pleading an ERISA claim. Indeed, in support of their motion to remand, respondents stated that they would seek leave to strike certain allegations in the complaint if the district court intended to rely on those provisions to find ERISA preemption. *See* Supp. App. 1a (n.11). The district court accepted respondents' refusal to replead their claim as an ERISA claim and properly dismissed it. App. 48a.

CONCLUSION

For the reasons expressed above and in the petition, this Court should grant the petition for a writ of certiorari, and reverse the opinion and order of the Tenth Circuit.

Respectfully submitted,

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June 6, 2005

APPENDIX

SUPPLEMENTAL APPENDIX A – EXCERPT FROM BRIEF IN SUPPORT OF MOTION FOR REMAND OF RESPONDENTS FILED MAY 22, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-02-0289L

AARON FELIX, SR., *et al.*,

Plaintiffs,

vs.

LUCENT TECHNOLOGIES INC.,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR REMAND

* * *

Qualifying plaintiffs are seeking monetary damages from defendant for this lost payment, easily calculable under a formula provided plaintiffs which involves simply filling in the blanks and using a calculator. Plaintiffs' fraud claim is not preempted by ERISA[11] and the court should remand the case to the District Court of Oklahoma County.

* * * *

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11. If the court should determine that the LMRA does not preempt plaintiffs' fraud claim and the case should be remanded, but also finds that the claim for the anniversary year sufficiently implicates ERISA so as to support removal on that basis only, plaintiffs would request leave to strike such allegations and claim for relief so as to allow remand.